

Entered on Docket

August 20, 2008

GLORIA L. FRANKLIN, CLERK  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA



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Signed: August 19, 2008

*Leslie Tchaikovsky*  
LESLIE TCHAIKOVSKY  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 08-40042 TM  
Chapter 7

ELAINA MARIE MOSES,

Debtor.

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/ **MEMORANDUM OF DECISION**

The chapter 7 trustee in the above-captioned case (the "Trustee") objects to the amended claim of exemption of the above-captioned debtor (the "Debtor") for a 2007 income tax refund in the amount of \$10,346 ("Tax Refund"). The Trustee seeks disallowance of the exemption. Alternatively, he seeks to surcharge the exemption to reimburse the estate for its costs seeking turnover of the Tax Refund prior to the Debtor's claiming it as exempt. The Debtor opposes both requests for relief. For the reasons stated below, the amended claim of exemption for the Tax Refund will be disallowed and the Trustee will be awarded an order for the monetary amount of the Tax Refund.

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DISCUSSION

2 **A. SUMMARY OF EVIDENCE AND ARGUMENTS**

3 On January 4, 2008, the Debtor filed a voluntary petition  
4 seeking relief under chapter 7 of the Bankruptcy Code. The Debtor  
5 filed her schedules of assets and liabilities on or before January  
6 30, 2008. She listed the Tax Refund as an asset on Schedule B, her  
7 schedule of personal property assets, in the estimated amount of  
8 \$2,500. She did not claim the Tax Refund as exempt on Schedule C,  
9 her schedule of claimed exemptions. The exemptions she did claim  
10 were those available to all judgment debtors, not only those who have  
11 filed for bankruptcy. See Cal. Civ. Proc. Code § 704.010 et seq.<sup>1</sup>

12 On February 11, 2008, the Trustee filed an ex parte motion and  
13 obtained an ex parte order directing the Debtor to provide the  
14 Trustee with a copy of her tax return when it was completed and to  
15 turn over the Tax Refund when it was received (the "Turnover Order").  
16 A copy of the Turnover Order was mailed to the Debtor.<sup>2</sup> On February  
17 20, 2008, the Debtor filed an amended Schedule C, substituting a  
18 schedule of exemptions based on Cal. Civ. Proc. Code § 703.140 for  
19 those based on § 704.010 et seq. On the amended Schedule C, the  
20 Debtor did claim the Tax Refund as exempt, albeit still in the  
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<sup>1</sup>California law provides two schedules of potential  
24 exemptions, one available to all judgment debtors and another  
25 available only to judgment debtors who have filed bankruptcy  
petitions. Compare Cal. Civ. Proc. Code § 703.140 with § 704.010  
et seq.

26 <sup>2</sup>For some reason, no copy of the Turnover Order appears to  
have been served on the Debtor's counsel.

1 estimated amount of \$2,500. On the same day, she filed a spousal  
2 waiver as required by § 703.140(a)(2).<sup>3</sup>

3 On February 21, 2008, the Trustee filed an objection to the  
4 amended claim of exemption for the Tax Refund. The Trustee sought  
5 disallowance of the amended claim of exemption on the ground that it  
6 was filed only after the Trustee sought turnover of the Tax Refund.  
7 Alternatively, the Trustee sought to surcharge the Tax Refund to  
8 reimburse the estate of its expense in seeking turnover prior to the  
9 Debtor's filing her amended claim of exemption. No hearing on the  
10 objection and/or request for surcharge was requested at that time.

11 The Debtor signed her tax return on April 14, 2008. The returns  
12 indicated that the Debtor was entitled to receive a tax refund of  
13 \$10,346. The Debtor did not file an amended Schedule B or C,  
14 reflecting the increased value of the Tax Refund and did not provide  
15 her tax returns to the Trustee when they were completed. As a  
16 result, the Trustee set the objection for hearing on July 17, 2008.  
17 Two days before the hearing, on July 15, 2008, the Debtor provided  
18 the Trustee with a copy of her tax returns.

19 At the hearing, the Trustee argued that the Debtor should not be  
20 allowed to exempt the Tax Refund. He gave an oral recitation of the  
21 facts supporting his request. The Court directed the Trustee to put  
22 these grounds in writing, with supporting evidence to the extent  
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25 <sup>3</sup>California law requires a married debtor filing alone to file  
26 a waiver, signed by both spouses, of the right to claim exemptions  
under the alternate set of exemptions in a subsequent bankruptcy  
filing while the current case is still pending. See Cal. Civ.  
Proc. Code § 703.140(a)(2).

1 necessary, and gave the Debtor a deadline for responding to his  
2 filing. The Trustee filed a declaration setting forth the grounds  
3 for his objection (the "Trustee's Declaration"), and the Debtor's  
4 counsel filed a timely declaration in response (the "Debtor's  
5 Counsel's Declaration").

6 **1. Trustee's Declaration**

7 In the Trustee's Declaration, the Trustee noted that he obtained  
8 the Turnover Order on February 11, 2008 and that the Debtor's only  
9 response was to file the amended claim of exemption. He noted that  
10 the Debtor continued to ignore the requirement of the Turnover Order  
11 to turn over the Debtor's tax returns when they were completed. The  
12 tax returns were not turned over until July 15, 2008, two days before  
13 the hearing on the Trustee's objection to the Debtor's exemption  
14 claim. The Trustee stated that he had made repeated written demands  
15 for turnover in the meantime: i.e., on April 13, 2008, April 29,  
16 2008, and June 12, 2008. The Trustee also stated that, between  
17 June 18 and 20, 2008, he received three telephone messages from the  
18 Debtor stating that the Tax Refund had been seized by creditors so  
19 that he was purportedly wasting his time prosecuting the objection.  
20 The Trustee stated that he responded in writing to the Debtor,  
21 advising her that, because she was represented by counsel, it was  
22 inappropriate for her to communicate directly with him. On July 15,  
23 2008, the Debtor's counsel finally provided him with a copy of the  
24 tax returns. On July 16, 2008, the Trustee was given documents to  
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1 support the Debtor's claim that the Tax Refund had been seized by  
2 creditors.<sup>4</sup>

3 Finally, the Trustee noted that Local Bankruptcy Rule 4003-1(b)  
4 requires a spousal waiver to be filed by the deadline for filing a  
5 debtor's Schedules of Assets and Liabilities. The deadline for  
6 filing these schedules in the instant case was February 19, 2008.  
7 The spousal waiver was not filed until February 20, 2008.

8 **2. Debtor's Counsel's Declaration**

9 The Debtor's Counsel's Declaration did not dispute any of the  
10 facts set forth in the Trustee's Declaration. With respect to the  
11 untimeliness of the spousal waiver, the Debtor's counsel noted only  
12 that no spousal waiver was necessary until the amended Schedule C was  
13 filed. He argued that, since amended claims of exemptions are  
14 liberally allowed, this rule should be liberally applied to permit  
15 spousal waivers to be filed after the deadline for filing schedules  
16 when filed with an amended claim of exemptions.

17 The Debtor's counsel also contended that the facts recited by  
18 the Trustee did not support a finding of bad faith. He noted that  
19 the Tax Refund was disclosed in the Debtor's Schedule B and at the  
20 § 341 meeting of creditors. Mere delay, he argued, does not  
21 establish bad faith. He noted that the Debtor had never received the  
22 Tax Refund in that the Internal Revenue Service and Franchise Tax  
23 Board applied an offset to repay debts owed by the Debtor's husband:

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25 <sup>4</sup>The Trustee noted that at least some of the claims of the  
26 creditors that seized the Tax Refund appear to be nondischargeable.  
Thus, the Debtor has been personally benefited at the expense of  
the estate as a result of the seizure.

1 i.e., for student loans and Department of Motor Vehicle charges. He  
2 noted that these debts were owed only by the Debtor's husband who was  
3 not a debtor. Thus, the Debtor was not required to schedule these  
4 creditors. He admitted that the Debtor did forget to schedule a  
5 small debt owed by the Debtor to the City of Inglewood, which he  
6 contended that the Debtor had forgotten about.

7 The Debtor's counsel asserted that the Trustee had failed to  
8 establish any prejudice. He declared that, after receiving a copy of  
9 the Turnover Order, he was unable to get in touch with the Debtor  
10 until July 10, 2008. Once he did, the Debtor supplied him with a  
11 copy of her 2007 tax returns which he then sent to the Trustee. The  
12 Tax Refund had already been seized by that time. He declared that  
13 the reason she had failed to comply with the Turnover Order sooner  
14 was that she believed that, since the Tax Refund had already been  
15 seized, there was no longer any need to do so.

16 Finally, the Debtor's counsel contended that the Trustee's  
17 request for reimbursement of the full amount of the Tax Refund was  
18 without merit. He noted that the Trustee had supplied no authority  
19 for requesting reimbursement of a tax refund that the Debtor never  
20 received and contended that no such authority exists. He also took  
21 issue with the Trustee's contention that his office has a policy of  
22 having debtors claim exemption under Cal. Civ. Proc. Code § 704  
23 unless the trustee discovers assets at the § 341 meeting and then  
24 amending to claim the § 703 exemptions. He declared that no such  
25 policy exists.

1                   **B. DECISION**

2                   Based on the foregoing, the Court concludes that the Debtor's  
3 amended claim of exemption as to the Tax Refund should be disallowed.  
4 The untimely filing of the spousal waiver is sufficient grounds for  
5 its disallowance. The Debtor's counsel is correct that amendments to  
6 claims of exemption are liberally allowed. See In re Michael, 163  
7 F.3d 526, 529 (9<sup>th</sup> Cir. 1998); In re Arnold, 252 B.R. 778, 784 (Bankr.  
8 9<sup>th</sup> Cir. 2000).

9                   However, a distinction should be made between an amended claim  
10 of exemption as to a specific asset and a change in the election of  
11 the California statutory scheme under which the Debtor is claiming a  
12 right to exemptions. The latter effects a much broader alteration to  
13 the rights of the bankruptcy estate and its creditors. The drafters  
14 of the Local Rule, Local Bankruptcy Rule 4003-1(b), were presumably  
15 aware of the liberal policy for permitting amended claims of  
16 exemption and chose to impose a more rigid deadline for making such  
17 an election. It was reasonable of them to conclude that the chapter  
18 7 trustee is entitled to a prompt notification of the statutory  
19 exemption scheme under which the debtor intends to proceed.

20                  The Court disagrees with Debtor's counsel that the facts recited  
21 above are insufficient to establish the Debtor's bad faith. There is  
22 no evidence that the Debtor acted in bad faith in her initial  
23 estimate that the Tax Refund would only be in the amount of \$2,500.  
24 However, clearly on April 14, 2008, when she completed her tax  
25 returns, she knew that it would be much more. Yet, she failed to  
26 amend her schedules or to inform the Trustee of the increased amount.

1 Had she done so, it is possible that the Trustee might have been able  
2 to prevent the Internal Revenue Service and Franchise Tax Board from  
3 seizing the Tax Refund. Moreover, as the Trustee pointed out, she  
4 clearly benefitted from the nondisclosure in that seizure  
5 resulted in the satisfaction of debts owed by her husband.

6 The Debtor also failed to turn over a copy of her tax return  
7 when it was completed despite being under court order to do so.  
8 Although the Debtor's counsel was apparently not served with a copy  
9 of the Turnover Order, a copy was served on the Debtor herself.  
10 Thus, she knew she had an obligation to provide a copy of her tax  
11 returns to the Trustee in April 2008 when she submitted them to the  
12 taxing authorities.

13 The Debtor also acted improperly in failing to respond to the  
14 Trustee's repeated demands for turnover of the Tax Refund until the  
15 Trustee was required to set the matter for hearing and then by  
16 responding only a day or two before.<sup>5</sup> There is no evidence that the  
17 Debtor was not aware of the attempts of her counsel to contact her  
18 between late April and early June 2008. The Debtor's improper  
19 communications to the Trustee, rather than going through counsel,  
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22 <sup>5</sup>According to the Debtor's Counsel's Declaration, counsel was  
23 unable to reach the Debtor until just before the hearing. He does  
24 not say what efforts were made prior to that time to contact the  
25 Debtor. Given this omission, the Court will assume that the  
26 Debtor's counsel made some attempts at communication. Again,  
failing to do so would have been malpractice. However, the  
Debtor's failure to respond to the attempts does not excuse the  
Debtor's counsel. He could have informed the Trustee of the  
problem rather than simply ignoring the communications.

1 indicate that she had received notice of the Trustee's demands by  
2 then.

3 The Debtor has submitted no evidence in support of the  
4 contention of her counsel that the Debtor acted in good faith. No  
5 declaration of the Debtor has been filed. The Debtor's counsel  
6 cannot speak to the Debtor's subjective state of mind.

7 The final question is the appropriate remedy. The Trustee's  
8 original request was for turnover of the Tax Refund. Clearly, the  
9 Debtor cannot turn over an asset that she does not have. However,  
10 money is fungible. Even if the Debtor had received the Tax Refund  
11 and had written the Trustee a check in the amount received, it is  
12 unlikely that the amount paid would represent the same dollars  
13 received from the taxing authorities. Thus, what the Trustee was and  
14 is seeking is a monetary award. The Trustee is entitled to such an  
15 order, whether as substitution for the Tax Refund or as a surcharge  
16 on her other exempt assets to protect the integrity of the court  
17 processes. See In re Latman, 366 F.3d 774, 786 (9<sup>th</sup> Cir. 2004). The  
18 order should provide that it is enforceable as a money judgment.

19 **CONCLUSION**

20 In sum, the Trustee's objection to the Debtor's amended claim of  
21 exemption for the Tax Refund is sustained. The Trustee is allowed an  
22 order directing the Debtor to pay the estate the sum of \$10,346  
23 which will be enforceable as a money judgment. The Trustee is  
24 directed to submit a proposed form of order in accordance with this  
25 decision.

26 END OF DOCUMENT

COURT SERVICE LIST

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